Supreme Court, U.S.
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No. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOHN GAGLIARDI and LEE GAGLIARDI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts' decisions incorrectly and against the weight of precedent in other circuits permit the IRS to fail to follow their own administrative, statutory and constitutional requirements concerning levy procedures, particularly in the preparation of an inventory of seized items, and to use this to thwart petitioners' efforts to prove their wrongful levy action under 29 U.S.C. §7426?

2. Should an alter ego defense been permitted to be raised by the IRS at the late stage it was raised in this case in light of contrary precedent in other circuits?

3. Alternatively, since the alter ego issue was permitted to be raised should petitioners have been permitted to attack the validity of the procedures used by the IRS in this allegedly wrongful levy?

4. Did the District Court Judge possess particular descriptions both of the place to be searched and of persons and things to be seized sufficient to support issuing an "Order For Entry On Premises To Effect Levy" when the Internal Revenue Service (IRS)/Department of Justice (DOJ) application for same misidentified the search place, failed to include persons later claimed to be alter egos, and failed to specify things to be seized either in the affidavit or an inventory resultant from the levy?

5. By ignoring Federal Rule of Criminal Procedure 41, did this Order For Entry On Premises To Effect Levy, as construed and executed, constitute a general warrant in violation of the Fourth Amendment of the U.S. Constitution?

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OPINIONS AND ORDERS BELOW

The unreported Judgment Order of the United States Court of Appeals for the Third Circuit affirming the order of the district court below appears at Appendix 1A. The Third Circuit's unreported Order denying the GAGLIARDI'S Petition for Rehearing appears at Appendix 3A. The opinion and order of the United States District Court for the Western District is not reported and appears at Appendix 4A.

JURISDICTIONAL STATEMENT

The final judgment for the United States Court of Appeals for the Third Circuit was issued in lieu of a mandate on November 28, 1997. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Article III of the Federal Constitution of the United States of America and under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners claim violations of the Fourth and Fifth Amendments to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation. and particularly describing the place to be searched, and the person or things to be seized." (Amendment IV).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law." (Amendment V).

STATUTORY PROVISIONS INVOLVED

Petitioners filed suit against the Respondent under the provisions of 26 U.S.C. §7426, **Civil actions by persons other than taxpayers**, which provides:

(a) Actions permitted.--

(1) Wrongful levy.--If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

STATEMENT OF THE CASE

Federal Jurisdiction in the court of first instance lies in 28 U.S.C. §§1331 (federal question) 1340 (internal revenue), 1346-1402 (United States as defendant), 1355 (forfeiture), 1356 (non-admiralty/maritime seizure) and 1357 (injuries per revenue collection).

On or about October 12, 1990, the agents of the Internal Revenue Service (IRS) applied for an Order permitting revenue officers to enter premises located at 191 Wall Road, Clairton, PA 15025 to effect a levy in a tax collection action involving U.S. Industrial Fabricators, Inc., a Pennsylvania corporation (hereinafter identified as USIF). Appendix 19A. An Order for Entry on Premises to Effect Levy was issued by the Honorable Donald J. Lee, W.D.Pa., on November 9, 1990. Appendix 23A.

On or about November 20, 1990, agents of the IRS entered one of three warehouse buildings situated at the USI Industrial Park, 141-191 Wall Road, Clairton PA 15025. The contents of Building No. 3 were seized. According to the IRS Notice of Seizure form 2433, dated 11-20-90, the description of property seized was listed as: 1 Hyster Fork Lift, value $3,000; 1 lot miscellaneous industrial materiels (sic), tools, and equipment inside warehouse, value $3,000; 1 Onan Naturel (sic) Gas Generater (sic), value $500.; and 1 Westinghouse natural Gas Generator, value $500; with a total inventory value set at $7,000. Plaintiff Gagliardi Exhibit 64; Government Exhibit 2. Also listed but crossed out with a line was 1 lot office furniture & Equipment.was seized by the IRS and subsequently sold at auction. On or about January 6, 1991, the IRS published an advertisement in the Pittsburgh Press concerning the sale of the property. It described the property as tons (literally) of Industrial Tools, Materials & Equipment and that "A 100'x200' warehouse is crammed with industrial goods to be sold in a forced sale situation (to be sold as one lot)." Plaintiff Gagliardi Exhibit 63. A Form 2435, Certificate of Sale of Seized Property, was issued on or about 1-18-91, listing the sale of (1) A lot of miscellaneous industrial material, tools and equipment for the sale amount of $16,000.00. Plaintiff Gagliardi Exhibit 62.

Petitioners and several other plaintiffs filed with the District Court a wrongful levy action arguing the goods and material seized and sold were their personal property and not assets of the subject taxpayer corporation for which the levy had been taken. Prior to trial, the trial court judge (again the Honorable Donald J. Lee) ruled that the plaintiffs would not be able to attack the validity of the levy and seizure documentation and procedures on the grounds that the only entity that had standing to do this was the taxpayer, itself.

Although Petitioners and other Plaintiffs and Claimant filed numerous pleadings over a period of years averring the unlawfulness of the IRS levy, seizure and sale, they were informed

by the Court their exclusive avenue of relief in this matter was through filing a wrongful levy action.

Trial commenced in this case before Judge Lee on March 4 1996 and continued through March 7, 1996. The case was then continued until May 6, 1996 when further testimony was taken, and judgment was entered in favor of defendant United States on May 7, 1996.

The trial consisted mainly of testimony from Petitioner John Gagliardi who testified through photographs and a more detailed inventory he had constructed from his memory as to what was in the building and to whom each item was owned. He testified that little or no property in the building had been owned by USIF which had undergone bankruptcy and an earlier seizure and sale of its assets. The property was either his personally, or owned by one of several other corporations including Step-Van Service Co., Inc, World Enterprises, and Gagliardi Swap Shop. He testified concerning items of personal property which were owned by himself or Julius Jones. He also testified concerning two safes which were in the building and which contained cash, coin collections, personal jewelry and other personal memorabilia owned by him and members of his family. Gagliardi had some difficulty in presenting the value of the jewelry since he did not have the jewelry to appraise but only had a description of his memory of what was had been in there and an inventory by a jeweler which was not permitted due to hearsay rules. Gagliardi also attempted to testify that the jewelry had been his mothers and was in his possession to be held for his children and distributed to them when the last of them became an adult. Gagliardi again had difficulty in demonstrating this since he testified that his mother's will had also been in the safes. This was an example of the problems arising from the ham-handed seizure of the property. Gagliardi also testified that there was other office documents and notes that were necessary to prove ownership and value that was seized, but not inventoried or ever later made available to Gagliardi.

There was also an attempt to have plaintiff Ninfa Cochran testify, but the Court did not permit her to testify since her knowledge was based either on hearsay from her mother and she was found not to be competent to testify as to the value of the jewelry. Petitioner Lee Gagliardi was another one of the children who had a property interest in the jewelry.

Prior to his testimony, Plaintiff Gagliardi had attempted to call as witnesses two of the IRS agents who had conducted the seizure and sale, Mr. Courter and Mr. Balas, but the Court did not permit their testimony on the technical ground that their names had not been listed on Gagliardi's pretrial narrative statement even though he was a party representing himself pro se and they were agents of the Defendant (who were permitted to sit at the counsel table for the defendant during the trial).

Prior to the Defendant's being required to put on its case, it filed a motion to dismiss under F.R.Civ.P. 52(c) and the Court ruled in the Defendant's favor dismissing the complaint and the various petitions for joinder. With respect to Petitioner Lee Gagliardi, the Court dismissed his petition to join and ruled that he had failed to present competent and credible evidence of ownership of the property that had been sold and seized by the IRS and failed to present evidence of its fair market value. Regarding Petitioner John Gagliardi, the Court ruled that since his testimony as to value was too speculative and his testimony as to ownership was conflicting, he failed to meet his burden of proof. He also found that Gagliardi individually was the alter ego of USIF, World Enterprises and the Gagliardi Swap Shop.

Upon various of the Plaintiffs' Motions to Alter or Amend Judgment, the Court issued an Opinion and Order on October 2, 1996 denying the Motions and further setting forth his rationale for his original decision to dismiss the matter. He added Step-Van to the list of corporations to which he asserted John Gagliardi was an alter ego. He reiterated his ruling that none of the plaintiffs, including Petitioner Gagliardi, had standing to attack the

procedures involved in the levy, even under his status as alter ego to the taxpayer corporation, that there had not been competent evidence of true ownership or superior rights in the seized property, and that as an alter ego, John Gagliardi's property could be restrained and levied upon just as if he was the taxpayer.

Petitioners John Gagliardi and Lee Gagliardi appealed this decision to the United States Court of Appeals for the Third Circuit. A panel consisting of Circuit Judges Becker, Alito and Garth affirmed the lower court's decision. Upon Petition for Rehearing with Suggestion for Rehearing En Banc, the Third Circuit, en banc, denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

A. The lower courts' decisions incorrectly and against the weight of precedent in other circuits permit the IRS to fail to follow their own administrative requirements and statutory requirements concerning levy procedures, particularly in the preparation of an inventory of the seized items, and to use this to thwart petitioners' efforts to prove their wrongful levy action under 28 U.S.C. §7426.

The district court ruled that Petitioners did not have standing to attack the procedures used by the IRS in the seizure and sale of the property. Judge Lee ruled that third parties are not entitled to notice of the assessment. Security Counselors, Inc. v. U.S., 860 F.2d 867, 870 (8th Cir. 1988). He determined that an alter ego, nominee or successor of a taxpayer is not entitled to the notices that IRS is to send to the taxpayer. Valley Finance, Inc. v. U.S., 629 F.2d 162, 169-170 (D.C.Cir. 1980). Additionally, he determined that the IRS is not required to give notice to a possible third party claimant or to search for them. Security Counselors, Inc., supra, 860 F.2d at 870. Based upon this legal background, he determined that claims of the plaintiffs/claimants with regard to the IRS procedures were without merit and not relevant to the issues

involved in this wrongful levy action. This determination was affirmed without decision by the Third Circuit. How the courts leapt from the concept that no notice was required to the petitioners to the concept that the petitioners were therefore not permitted to attack the IRS procedures was not explained.

In fact, the failure of the IRS to follow its own regulations and statutory requirements in this seizure was highly relevant to the Petitioners' ability to prove their case. This is particularly true with respect to the failure to provide a detailed description in its inventory. The inventory was woefully inadequate in its description. See Gagliardi Exhibit 64. It is axiomatic that in a levy action, the Internal Revenue Service is to follow the procedural requirements of the Fourth Amendment, federal statutes, and its own administrative policies. G.M. Leasing Corp. v. United States, 429 U.S. 336 (1977). These same mandates require a description and identification with reasonable certainty of property seized. See, e.g., 26 C.F.R. §§ 301.6335-1(a), 403.26(a).

This was not done in this case, the initial property seizure listing mentioning only three items individually and the rest as a generic "catch-all" under the of "1 lot miscellaneous industrial materials, tools, and equipment inside warehouse." While such a general description might be understandable in cases of large seizures, a supplemental notice of seizure must be made as soon as the property can be identified. For 53 days, the IRS had custody and control of the seized property, yet failed to make any such descriptive inventory although it was able to do so at its discretion.

The lack of a required inventory compromised the Petitioner's ability to meet the burden of proof of ownership and value of the seized property as required under the wrongful levy action. The sheer volume of the property taken – the contents of a 220' x 50' warehouse 18' high filled to capacity – makes a mental inventory on the part of the Petitioners impossible under all circumstances. Given that the actual records of ownership and value concerning this property were also seized along with the

property – and said records never returned – the Internal Revenue Service made the Petitioner's task of offering to the Court evidence of ownership and value an impossibility.

The inability of the Petitioners to often provide the trial court with any corroborated evidence of ownership and value was not the fault of the Petitioners at all but directly due to intentional actions by the Internal Revenue Service. If the Internal Revenue Service had performed an inventory as required or allowed the Petitioners to videotape, photograph or otherwise catalog the inventory as they repeatedly requested, anyone could have relied on that data as a groundwork from which to commence, defend or clarify any wrongful levy claim arising. The Petitioners' efforts to meet their burden of proof were deliberately despoiled by the Internal Revenue Service.

The Petitioners were unable to meet their burden of proof through no fault of their own, and as a direct consequence of Internal Revenue Service negligence or willful misconduct. As noted, the Internal Revenue Service never prepared the required seized property inventory, and further, allowed records of the petitioners to be pilfered, lost or destroyed following the sale. Said records were never returned to the Petitioners even though they had no intrinsic sale value, meaningful only to the Petitioners insofar as they enabled them to evince ownership and value specific to the seized property.

This difficulty was exacerbated by the fact that the trial court failed to follow the normal tripartite shifting of the burdens of proof and persuasion in a wrongful levy case under 26 U.S.C. §7426(a). Under the procedure adopted by most courts, plaintiffs are initially required to demonstrate title to or an ownership interest in the property levied upon. The burden then shifts to the government to prove by substantial evidence that there is a nexus between the property and the taxpayer. The plaintiffs are left with the ultimate burden of proving that the levy was wrongful. See Libutte v. United States, 107 F.3d 110, 118 (2d Cir. 1997); Century

Hotels v. United States, 952 F.2d 107, 109 (5th Cir. 1992); Security Counselors, Inc. v. United States, 860 F.2d 867, 869 (8th Cir. 1988); Flores v. United States, 551 F.2d 1169, 1175 (9th Cir. 1977); Morris v. Unites States, 813 F.2d 343, 345 (11th Cir. 1987); Valley Finance, Inc. v. United States, supra, 629 F.2d at 171 n. 19. To the extent that the instant case provides within the Third Circuit a different burden of proof, this difference requires the supervision of this Court to resolve the difference and is an important reason for granting certiorari.

The extensive testimony of Plaintiff Gagliardi concerning his recollection of the contents of the warehouse and their ownership was sufficient to transfer the burden to the government to prove by substantial evidence the nexus between the property and the taxpayer. See Nelson v. United States, 821 F.Supp. 1496 (M.D.Ga. 1993). If the government had properly been put to this test, its failure to properly document and inventory the contents of the warehouse would likely have proved fatal to its effort. Under these circumstances, the party whose intentional or negligent actions resulted in the lack of a meaningful inventory would have been the ones to suffer the consequences of its action. It is clear that it should not be the burden of the plaintiff in a wrongful levy case to prove the nexus between the property and the taxpayer. Morris v. U.S. Dept. of Treasury, I.R.S., 813 F.2d 343 (11th Cir. 1987).

The lack of an adequate inventory was especially damaging to the claimants to ownership to the jewelry and other personal memorabilia in the safes, including both Petitioners. Although Gagliardi testified extensively concerning these items, the court ultimately dismissed all his testimony as inherently unbelievable and unsupported. The court permitted no other testimony concerning this on the basis of lack of competency and hearsay.

In fact, however, Gagliardi's testimony was corroborated as to the existence of the safe and some of its contents by one of the IRS agent's himself. See Internal Revenue Service Memorandum,

dated June 21, 1991, from John Courter to Jon Hoffman, Gagliardi Exhibit 61. Mr. Courter indicated that he was present on January 18, 1991, after the sale, when Gagliardi opened a large double door safe, "which was now visible because adjacent materials had been removed." He noted that the contents included a shopping bag (which Gagliardi had identified as holding the jewelry), with "some collectible coins and silver certificates and miscellaneous tools and testing equipment." Although called by Plaintiff Gagliardi as a witness, the court did not permit Mr. Courter's testimony on the technical ground that his name had not been listed on the pretrial statement, a dubious decision in view of Gagliardi's pro se status and his presence in the courtroom at the time of the trial. The government could not plead surprise since his deposition had earlier been taken.

Under the circumstances, therefore, the failure to require the government to bear its standard of proof to show by substantial evidence the nexus between the property and the taxpayer was error and against the authority of most of the other circuit courts. The grant of certiorari to decide this important burden of proof issue in wrongful levy cases is necessary.

B. An alter ego defense should not have been permitted, or alternatively, if it was permitted, petitioners should have been permitted to attack the validity of the levy procedures.

The record in this case clearly indicates that the alter ego allegations by the government came after the seizure and sale of the disputed property. It must be noted that in virtually all cases the issue of alter ego has been raised during the early stages of a levy process and generally before the seizure and virtually always before the sale. See, e.g., Libutti v. United States, supra, Valley Finance, supra. In fact, it has been held that alter ego arguments must be made prior to the asset sale in Pattorf v. CIR, 95-1 USTC 50, 250 (1995). As set forth in Valley Finance, 629 F.2d at 171, n. 17:

> ... the new section 7429 procedures ... place an initial burden on the government, and the initial required statement of reasons implicates the government's contention that a taxpayer and his alter ego are one and the same .... Thus as a policy matter, the third parties charged with alter ego status are now assured an early ruling on the question of whether collection of a delinquent tax from the alter ego's assets is in jeopardy. (emphasis added)

In this case, therefore, where the issue was essentially raised at trial, it should not have been permitted. No earlier notice under §7429 had been given to any alleged alter egos. The fact that it was permitted in this case is either a departure by the Third Circuit from rules followed by other circuits or is an important issue of public importance warranting the exercise of the authority of this Court.

Alternatively, if the alter ego argument is permitted, the alleged alter ego plaintiff should have been permitted to attack the inadequate levy procedures employed by the IRS in this case. As noted in Valley Finance, "... if it assumed that Pacific is the taxpayer's alter ego, then the corporation's position is identical to that of its owner. Id. In this case, as seen below, such an attack would have or should have been successful.

A core issue is the suspect validity of the aforementioned Entry Writ. The Entry Writ appended herein authorized the IRS to enter "the premises located at 191 Wall Road...". This address is a verifiable mail drop for several warehouse buildings, attached offices, and the private residential trailer dwelling of an uninvolved third party. As constructed, the Entry Writ fails to identify with particularity which of the buildings at the named address was subject to IRS entry and seizure actions. The case record contains no denial by the defendant party that 191 Wall Road was the mailing address for all of the diverse structures and numerous persons common to this private property premises comprised of 47 acres of land, more or less.

The language of the Entry Writ as evidenced in the Appendix was such that all property contained within structures at the 191 Wall Road premises was subject to entry, search and seizure – even the buildings and private residential dwelling not associated with the subject taxpayer corporation. Clearly, the Entry Writ was therefore general and presumptively unreasonable.

While the Internal Revenue Service only entered and seized property in one building, they nevertheless were over-broadly authorized by said Entry Writ to do the same to every other structure on the 191 Wall Road premises identified in the Entry Writ. The District Court afforded the IRS absolute discretion to seize all property in all structures if it so chose to do, thereby violating Fourth Amendment rights. The Entry Writ was over-broad.

The defect in the application for the Entry Writ and the Writ itself was the lack of specificity necessary to sustain the standards of probable cause. This fact "...makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant." Stanford v. Texas, 379 U.S. 476,485, 85 S.Ct. 506 (1965) quoting Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74 (1927) Further, in United States v. Condo, 782 F.2d 1502, 1505 (CA 9. 1986), the Court ruled "The IRS application must have sufficient specificity to enable the judge to make an independent determination of whether probable cause exists and to prevent the agents from having uncontrolled discretion to rummage in search of sizable items once lawfully within the premises." See also Matter of Gerwig, 461 F. Supp 449 (1978). Neither the specific building to be entered nor the persons or things to be seized were described in the Entry Writ application or the Writ itself as to meet the standards of probable cause necessary for the warrant to issue.

The Entry Writ contains another equally compelling defect. In the Matter of Bricker, the court held that "In addition to not establishing probable cause for the issuance of a writ of entry, the Government's application for the writ suffers a second fatal defect: vagueness." 453 F. Supp. 91 (Wisc. 1978). The IRS failed to identify in the Writ application what property was suspected to be assets of the subject taxpayer corporation, stating only "equipment, inventory, furnishings, cash register and contents thereof." The question to be asked is "thereof what?" Which building of the four on the premises? Which contents thereof?" Furnishings of the private residential trailer dwelling? The discretion to do just that – an unrestricted license to search and seize – was permitted by the Entry Writ! The Writ Application and Writ itself clearly placed all property in all structures at 191 Wall Road under unconstitutional jeopardy of illegal entry and seizure.

In the case of Giles v. United States, it was recognized that the mandate to search is a mandate to "...exercise one of the most drastic and offensive powers of government...the great weight of authority is that the warrant should be specific and complete within itself." 284 F.208 (CA 1 1922). Insofar as the Entry Writ must be specific, ergo, the search and seizure must mirror the same standard of specificity. Murby v. United States, 293 F. 849 (CA 1, 1923). The record will show that this did not happen.

The IRS' Notice of Sale subsequent to the seizure noted "literally tons" of industrial materials, tools and equipment. Such a description does not describe with sufficient particularity the identity and value of this property. This cursory inventory made by the IRS suffers "vagueness.." Any of these defects in the Entry Writ invalidate the search and seizure.

While a wrongful levy action as filed by the Petitioners is a civil action, an IRS application for entry warrant to seize specifically identified items to sell in satisfaction of tax liability and conduct of search are subject to standards established for criminal search warrants. Matter of Stubblefield, Inc., 810 F.

Supp.277 (E.D. Cal. 1992). In fact, the Federal Rules of Criminal Procedure 41(d) are applicable to 26 USC §3601 [now §7606] (Entry of Premises for Examination of Taxable Objects). "An affidavit on which a warrant is issued must conform to the requirements of the Federal Rules of Criminal Procedure, the Fourth Amendment, and judicial opinions on the subject." See also, 47 C.J.S. §§ 1218.

Despite this fact, the District Court ruled that the Federal Rules of Criminal were irrelevant to the case. Under this erroneous ruling, Petitioners due process rights were violated on various levels. Probable cause required in a tax case is compared to that in a criminal case by the Ninth Circuit: "we start by observing just as police need probable cause to believe that evidence sought is to be found in the area to be search and that such evidence relates to a crime, so, too, the Internal Revenue Service needs probable cause at the time assets are initially seized to connect those assets to a taxpayer with outstanding taxes due." Flores v. United States, 551 F. 2d 1169, 1174-1175 (CA 9, 1977).

A lawful seizure under or in connection with an internal revenue law is valid only where such search is made pursuant to a valid search warrant. A seizure is illegal when it is made in connection and illegal search or entry. Agnello v. United States, 46 S.Ct. 4, 269 U.S. 20,70 9 (1925). The argument presented by the Petitioners for this Petition does not challenge pre-levy actions by the IRS, but specifically the actual entry warrant and seizure itself. Again, if the entry warrant is unlawful, then all actions by the Internal Revenue Service subsequent to it are negated.

As noted above, the Internal Revenue Service is required by the Fourth Amendment, the Rules of Criminal Procedure, and its own administrative policies to describe and identify with reasonable certainty in an inventory the property seized. GM Leasing Corp. v. U.S., supra.

Therefore, insofar as the information presented herein shows with objective clarity the issuance of a defective entry warrant, the petition for Certiorari should be granted.

While the case(s) from which this present action arose are lengthy and complex, the issue at hand is a matter of hornbook law - that any entry warrant in violation of Fourth Amendment rights is invalid and that all actions subsequent to said invalid entry warrant are similarly unlawful.

The Respondents in this matter entered the premises, seized and later sold disputed property in a tax action. Regardless of the propriety of all Respondent actions prior to and following the entry of the premises and seizure and sale of the property contained therein, the entry warrant was unlawful. It was unquestionably vague, non-specific, and no inventory of property seized under color of this entry warrant was completed.

The actions of the IRS went far beyond an effort to collect alleged taxes due but subjected the Petitioners to harassment and punishment which cannot be mistaken for anything else. At no time were Petitioners ever consulted regarding the value of items seized through the Internal Revenue Manual (IRM) at 56 (12) 6.1 (4) 3 states that "the taxpayer should be questioned as to the property's cost and present value." IRM 56 (12) 7 denotes property valuation guidelines and another section entitled "appraisal Assistance" states that "property of a highly specialized nature, i.e. manufacturing equipment, real property, professional tools and instruments, may require the services of a service valuation engineer, an appraiser with another government agency, or a private appraiser or person skilled in the use or sale of the property." IRM 56 (12) 7.3. See also IRM 56 (12) 3.1(8). The Code of Federal Regulations provides for the appraisal of seized goods. 26 CFR Part 30, Sec. 403.25(a)(2). Beyond having no consultation or appraisal assistance, any records available to value said property were lost or destroyed in the taking of the property by the successful bidder.

While the IRS' violation of its own internal operating procedures does not directly create enforceable rights, a drastic undervaluation of petitioner's property can shock judicial conscience and set aside a sale. Ringer v. Basile, 645 F.Supp. 1517 (Colo. 1986). The auction proceeds received by the IRS did not approach the bare minimum scrap value of the property let alone a fair market value. it has been held that when the Internal Revenue Service proceeds by lien and levy to collect unpaid taxes, as opposed to a setoff, it must strictly comply with certain procedural requirements. Montavon v. Us., 864 F.Supp. 519.

It must also be noted that the entry order stated the IRS was to seize what was contained within "any cash register, safe, vault or other locked safe keeping device." In violation of the entry order, the IRS instead seized all contents of the warehouse including property of the petitioners and others. Two large safes contained within the warehouse were never opened until after the sale, and the contents thereof awarded to the successful bidder. Due to its failure to inventory the property, the IRS failed to comply with the entry mandate to seize the safe(s) contents and further, seized everything else beside that which the entry order specified. The record will indicate the IRS admitted it was unaware of the existence of the safes until after the sale, despite being in exclusive control of the warehouse area for almost two months. A simple inventory of the warehouse contents would have revealed the existence of said safes and complied with the entry order, but as aforementioned, such inventory was not done.

Of equal importance is that a coin collection was contained within one of the safes. While the evidence of ownership and value of the coins in the collection was a matter of dispute during the wrongful levy proceedings, it nevertheless must be emphasized the IRS never disputed the existence of the coin collection in dispute. What is important regarding this fact is even at its lowest face value - the collective denominations of the coins constituted valid U.S. currency, the sale of which is prohibited by the tax code. In re

dunne Trucking Co., (Bkrptcy. Iowa 1983) 32 B.R. 182. The IRS own procedural manual states that cash should be inventoried by coin and bill denominations. 56(16)2(6).

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96-3671

JOHN GAGLIARDI; IRWIN A. SCHIFF;
DAVID LIKENHEIMER, JULIUS JONES;
STEP VAN SERVICE CO., INC.;
JOSEPH MARK; NEIL PRICE, ESQ.,

v.

UNITED STATES OF AMERICA

JOHN GAGLIARDI, LEE GAGLIARDI*
(Pursuant to Rule 12 (a) , F.R.A.P.
Appellants

Appeal from the United States District Court
For the Western District of Pennsylvania
D.C. Civ. No. 91-cv-00045
(District Judge: Honorable Donald J. Lee)

Submitted under Third Circuit LAR 34:1 (a)
August 5, 1997
Before: BECKER, ALITO and GARTH,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the order of the district court of October 2, 1996 be and is hereby AFFIRMED.

Costs taxed against appellants.

BY THE COURT:

_____/s/_____
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96-3671

JOHN GAGLIARDI; IRWIN A. SCHIFF;
DAVID LIKENHEIMER, JULIUS JONES;
STEP VAN SERVICE CO., INC.;
JOSEPH MARK; NEIL PRICE, ESQ.,

v.

UNITED STATES OF AMERICA

JOHN GAGLIARDI, LEE GAGLIARDI*
Pursuant to Rule 12 (a) , F.R.A.P.
Appellants
D.C. Civ. No. 91-cv-00045

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALIOTO, ROTH, LEWIS, McKEE, AND GARTH,[1] Circuit Judges

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SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by the Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service having not voted for rehearing by the court in banc, the petition is DENIED.

BY THE COURT:

_____/s/_____
Circuit Judge
Dated: Nov. 19, 1997

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[1]as to panel rehearing only

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN GAGLIARDI, IRWIN A. SCHIFF, JULIUS JONES, STEP-VAN SERVICE CO., INC., and JOSEPH MARK,	)	
Plaintiffs	)	
vs..	)	Civil Action No. 91-0045
UNITED STATES OF AMERICA,	)	
Defendant.	)	
LEE GAGLIARDI, GINA GAGLIARDI, JULIE A. GAGLIARDI, and NINFA B. COCHRAN,	)	
Claimants,	)	
vs.	)	
U.S. INDUSTRIAL FABRICATORS, INC., JEFFERSON BOROUGH POLICE DEPARTMENT and DUQUESNE LIGHT COMPANY,	)	
Other Parties.	)	

MEMORANDUM OPINION

October 2, 1996

Before the Court are the following motions:

(i) **Plaintiff Ninfa Cochran's Motion to Alter or Amend Judgment** (Document #181);

(ii) **Plaintiffs Julius Jones'/Step-Van Service Co.,Inc.'s Motion to alter or Amend Judgment** (Document No. 182);

(iii) **Plaintiff (sic) Julie Gagliardi and Gina Gagliardi Bonavich Joint MotionTo Alter or Amend Judgment** (Document No. 183);

(iv) **Plaintiff John Gagliardi's Motion to Alter or Amend Judgment** (Document No. 184); and

(v) **Plaintiff Lee Stewart Gagliardi's Motion to Alter or Amend Judgment** (Document No. 187)

In support of their respective motions, Ninfa Cochran ("Cochran"), Julie Gagliardi ("Julie"), Julius Jones ("Jones"), and Step-Van Service Co., Inc. ("Van"), filed their **Omnibus Post Trial Brief** (Document No. 189).

The defendant, United States of America, filed its United States Brief in Opposition to the Motions to Alter or Amend Judgment (Document No. 190), to which the plaintiff, John Gagliardi ("Gagliardi"), replied in his Plaintiff John Gagliardi's Response to the United States Brief in Opposition to His (sic) Motion to Alter or Amend Judgment (Document No. 191).

Neither of the plaintiffs, Irwin Schiff ("Schiff") and Joseph Mark ("Mark") filed a motion to alter or amend judgment entered by the Court in favor of the United States.

Background

The case was tried before the Court without a jury and at the conclusion of the plaintiffs' case in chief on May 7, 1996, the Court entered judgment in favor of the United States and dismissed the complaint with prejudice.

The Court heard testimony beginning March 4, 1996, through March 7, 1996, and continuing on May 6, 1996, until judgment was entered for the United States on May 7, 1996.

During four days of trial testimony in March, 1996, Gagliardi spent three and one-half days testifying. In addition, Irwin Schiff also testified.

Gagliardi testified thereafter when the trial resumed on May 6, 1996. Gagliardi testified not only on his own behalf but on behalf of co-plaintiffs, Van and Jones, as well as the claimants, Cochran, Lee, Julie and Gina. The cases in chief of Gagliardi, Van and Jones were concluded on May 6, 1996, and the Court thereafter, gave the co-claimants an opportunity to adduce evidence in support of their claims.

The claimants, Lee, Julie and Gina, the children of Gagliardi, did not appear and offer testimony on their behalf at the trial.

On May 6, 1996, Cochran was called to testify but pursuant to an objection of the United States, the Court ruled that Cochran was not competent to provide testimony regarding the value of certain jewelry and could not testify as to what her deceased mother told her.

After the United States conceded that it was not claiming that she was the alter ego of the taxpayer, U.S. Industrial Fabricators, Inc., ("USIF"), Cochran adduced no additional testimony and rested her case in chief.

Lee, Julie, Gina and Cochran failed to present any evidence to support their contentions that they owned property which was seized or sold by the IRS. Moreover, they failed to present competent credible evidence to establish the fair market value of any property they claim they owned immediately before the levy.

Following the United States' motion pursuant to Fed. R. Civ. P. 52(c) seeking dismissal with prejudice of the plaintiffs' and claimants' complaint and petitions for joinder, the Court made the following rulings:

(i) With respect to Lee, the claims set forth in his petition to join were dismissed because he failed to appear and give testimony, failed to present competent and credible evidence of ownership of property that was seized and sold by the IRS, and failed to present evidence of the fair market value of such property immediately before the levy;

(ii) The Court dismissed the petitions for joinder of Cochran, Julie and Gina because they, too, failed to present any competent evidence of ownership or property which was seized and sold by the IRS, and failed to present evidence of the fair market value of such property immediately before the levy;

(iii) The claims of the plaintiffs, Jones and Step-Van were dismissed because they, too, failed to present competent and credible evidence that they owned property which the IRS seized and sold, and failed to present competent and credible evidence as to the fair market value of such property immediately before the levy.

(iv) With respect to Gagliardi, the Court found that Gagliardi gave conflicting testimony as to the ownership of the property seized by the IRS and that because his testimony with regard to the value of the property was so speculative, a reasonable trier of fact could not value the property or identify its the ownership. Therefore, the Court concluded that Gagliardi failed to meet his burden of proof by a preponderance of the evidence.

Moreover, the Court found that, based on the evidence presented, Gagliardi was the alter ego of the taxpayer, USIF, and World Enterprises and the Gagliardi Swap Shop. Inadvertently, the

Court did not find that Gagliardi was the alter ego of Step-Van. However, the record clearly supports a finding that Gagliardi and Step-Van were alter egos, particularly since Step-Van has been dormant since 1978.

A. Plaintiff Ninfa Cochran's Motion to Alter or Amend Judgment (Document No. 181).

Cochran asserts that she was not given the opportunity to identify jewelry allegedly improperly levied on by the IRS. Moreover, she repeats many of the same arguments rejected by the Court at trial in refusing her proffered testimony.

Cochran raises a new argument in her brief, i.e. that no plaintiff received an exemption of $650 in personal property.

B. Plaintiffs Julius Jones's/Step-Van Service Co., Inc.'s Motion to Alter or Amend Judgment (Document No. 182)

Jones and Step-Van repeat the same conclusionary arguments advanced at trial by their counsel, and in addition, raise new variations on their earlier arguments. Distilled to their essence, the arguments are that neither Jones nor Step-Van were alter egos of Gagliardi or USIF;[1] that the IRS activities "eviscerated" Step-Van (which had been dormant since 1978); that Jones and Step-Van owned property within Building No. 3; that the IRS failed to supply a notice and demand to them; that the IRS did not give Jones and Step-Van a notice of intent to levy; that the IRS was required to bring a civil action under 26 U.S.C. § 7403 to enforce its lien; that the Court failed to inquire why the IRS maliciously sought to inflict economic ruin on Gagliardi; that the Court failed to demand expert witnesses from the Department of Justice or the IRS and/or failed to appoint one itself; that the Court should have considered Exhibit "B" annexed to the motion to alter or amend judgment instead of ruling it inadmissible; that the IRS

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[1] The United States does not contend that Jones was an alter ego of anyone.

did not follow its own guidelines; and that neither Jones nor Step-Van received a $1,000 exemption under 26 U.S.C. § 6334.[2]

The conclusionary arguments set forth in the motion are similar to those made at trial and rejected by the Court. However, the claim for a $1,000 exemption pursuant to § 6334 is a new claim. In any event, the Court finds that such a claim is without merit since the statute refers to property of the taxpayer and not to any claimants.

C. Plaintiff Julie Gagliardi and Gina Gagliardi Bonavich Joint Motion or Demand (sic) Judgment (Document No. 183).

Julie and Gina Gagliardi assert arguments similar to those of Jones and Step-Van in that they were entitled to notice and demand, and that the IRS sold property from the warehouse for less than its value, which arguments were already ruled on by the Court.

D. Plaintiff John Gagliardi's Motion to Alter or Amend Judgment (Document No. 184)

Gagliardi reasserts many of the arguments he has advanced throughout this proceeding and at trial, i.e., that notice and demand were not given. In addition, he raises the new argument that the Court should have informed him that a wrongful levy "was not the exclusive avenue of relief." (Gagliardi Motion at ¶ 15).

In addition to repeating the arguments rejected by the Court at trial, Gagliardi also asserts that certain property was exempt from levy under 26 U.S.C. § 6334. (Gagliardi brief at § 3).

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[2] Jones and Step-Van argue that did not receive a $1,000 expemption under 26 U.S.C. §6334. The Court assumes that Conchran's new argument in that regard is based on § 6334. The Court finds this new claim without merit because § 6334 refers only to the property of the taxpayer.

E. Plaintiff Lee Stewart Gagliardi's Motion to Alter or Amend Judgment (Document No. 187)

Lee seeks to alter or amend judgment based on attacks on the IRS procedures and the Court's rulings.

Moreover, Lee asserts he was not the alter ego of either USIF or Gagliardi.[3]

All of the motions to alter or amend judgment will be denied.

Discussion

The motions to alter or amend judgment of Julius Jones, Step-Van Service Co., Inc., Gagliardi and Cochran are based on Fed. R. Civ. P. 54©, which reads as follows:

> Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

However, Lee, Julie and Gina cite Fed. R. Civ. P. 59 as the basis for their motions.

Because the motions of the plaintiffs/petitioners are essentially motions for reconsideration of the Court's rulings made at trial, the Court concludes that they come within the ambit of Fed. R. Civ. P. 59(e). 11 Wright, Miller & Kane, Fed. Practice & Pro., § 2810.1 at 122 & n. 8 (West Publ. 1995) (citations omitted);

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[3] The United States has never claimed that Lee was an alter ego of anyone.

accord. Wave v. First Citizens Nat'l Bank, 846 Fed. Supp. 310, 313 (M.D. Pa. 1994) (citations omitted), aff'd 31 F. 3d 1175 (3rd Cir. 1994); Database America, Inc. v. Bellsouth Advertising & Pub. Corp., 825 F. Supp. 1216. 1219-1220 (D.N.J. 1993):

> The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.....Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration.

Harsco Corp. v. Zlotnicki, 779 F. 2d. 906 (3d Cir. 1985), cert. denied. 476 U.S. 1171 (1986); accord Ruscavage v. Zuratt, 831 F. Supp. 417, 418 (E.D. Pa. 1993). It is clear that "a motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of.... Nor is it to be used to put forth additional arguments that could could have been made but which the party neglected to make before judgment." Waye, supra, 846 F. Supp. At 314; accord. Database America, Inc. supra, 825 F. Supp. At 1220.

When a motion for reconsideration raises only a party's disagreement wih a decision of the court, that dispute should be dealt with in the normal appellate process, not in a motion for reargument. Id. at 1220.

Moreover, it is clear that a motion under Fed. R. Civ. P. 59(e) "should be granted sparingly because of the interest in finality and conservation of scarce judicial resources." Pennsylvania Ins. Guar. Ass'n., supra, 812 F. Supp. At 524; accord Strine v. Borough of Media, 1996 WL 12959 (E.D. Pa. 1996) (citing Ruscavage v. Zuratt, 831 F. Supp. at 418 (E.D. Pa. 1993)). Accordingly, the decision to grant or deny a Rule 59)e) motion rests within the discretion of the trial court. McCarthy v. Manson, 714 F. 2d. 234, 237 (2d Cir. 1983); accord Kiewit Eastern Co., Inc., v. L. & R. Const. Co., Inc., 44 F.3d. 1194, 1204 (3d Cir. 1995).

26 U.S.C. § 7426(a)(1), which constitutes a limited waiver of the United States' sovereign immunity and authorizes a wrongful levy, states:

> If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property as wrongfully levied upon may bring a civil action against the United States in a district court of the United States.

It is clear that a taxpayer may not maintain a suit under § 7426 to contest either the assessment or collection of taxes. Rosenblum v. U.S., 549 F. 2d 1140, 1144-45 (8th Cir. 1977), cert. denied, 434 U.S. 818 (1977); Brown v. U.S., 743 F. Supp. 742, 743 (D. Nev. 1990).

In order to maintain an action under § 7462(a), the plaintiff must be a person who has a "fee simple or equivalent interest, a possessory interest, or a security interest in the property levied upon." Frierdich v. U.S., 985 F. 2d. 379, 383 (7th Cir. 1993); accord Aspinall v. U.S., 984 F. 2d. 355, 357-58 (10th Cir. 19930.

An unsecured or contingent creditor has no standing to pursue a claim under § 7426. Frierdich v. U.S., supra; Aspinall v. U.S., supra; accord Valley Finance Inc. v. U.S., 629 F. 2d. 162, 167-169 (D.C. Cir. 1980), cert. denied. 451 U.S. 1018 (1980); cf., Security Counselors, Inc. v. U.S., 860 F. 2d. 867, 869 (8th Cir. 1988). ("Section 7426 contains two pre-requisites: (1) that the plaintiff have an interest in or lien on the property at issue, and (2) that the levy be wrongful (i.e. that the property not belong to the taxpayer against whom the levy is directed").

Similarly, a party who files suit under §§ 7426 cannot assert the rights of other alleged owners of the property levied upon. Aspinall, supra, 984 F. 2d. at 358. (person claiming to be agent

because he possessed property of another lacks standing to prosecute a claim pursuant to § 7426(a)(1).) Cf. Valley Finance, Inc., v. U.S., 629 F. 2d. at 168; Century Hotels v. U.S., 952 F. 2d. 107, 109, (5th Cir. 1992).

A party who claims his property was wrongfully levied on must file his own suit or intervene in a pending suit. Horton Dairy, Inc. v. U.S., 986 F. 2d. 286, 292 (8th Cir. 1993).

It is clear that an alter ego of the taxpayer does not have standing to maintain an action pursuant to 7426(a)(1). F.P.P. Enterprises v. U.S. 830 F. 2d. 114, 117-118 (8th Cir. 1987); Loving Savior Church v. U.S., 728 F. 2d. 1085 (8th Cir. 1984).

Moreover, under § 7426, the ultimate burden of persuasion is on the plaintiff to show that his or her interest in the property levied upon is superior to the lien of the United States and that the levy was wrongful. Century Hotels v. U.S. 952 F. 2d. at 109 (citing Texas Commerce Bank-Fort Worth , N.A. v. U.S., 896 F. 2d. 152, 156 (5th Cir. 1990)); Security Counselors, Inc. v. U.S., 860 F. 2d. at 869 (plaintiff has the ultimate burden of proof under § 7426; it must be shown that the levy filed against property in its possession was wrongful) (citing Arth v. U.S., 735 F. 2d. 1190, 1192-93 (9th Cir. 1984)); Dixon v. U.S., 689 F. Supp. 598 , 599 (M.D. Ga. 1988), aff'd without publ. op., 872 F. 2d. 435 (11th Cir. 1987); Valley Finance, Inc. v. U.S., 629 F. 2d. at 171 n. 19; Xemas, Inc. v. U.S., 689 F. Supp. 917, 922 (D. Minn. 1988), aff'd without publ. op., 889 F. 2d. 1091 (8th Cir. 1989); Rabinof v. U.S., F. Supp. 830 (S.D.N.Y. 1971).

If a plaintiff demonstrates that she/he possesses a superior interest in the property levied upon, and that the levy was wrongful, the recoverable damages are expressly limited by the terms of § 7426(b)(2)(C) which provides that the court can only grant judgment for the amount not exceeding the greater of "(i) the amount received by the United States from the sale of such property, or (ii) the fair market value of such property immediately before the levy." General Carbide Corp. v. United States, 1993

WL 379585 (W.D. Pa.). It is clear that § 7426(b) does not authorize the recovery of general damages from the United States. Winebrenner v. U.S., 924 F. 2d. 851, 854 n. 4 (9th Cir. 1991).

It is also clear that the Plaintiffs, Jones and Step-Van, and the claimants, Lee, Cochran, Julie and Gina, failed to meet their burden of demonstrating that they owned or had superior interest in the property that was seized and sold by the IRS and each also failed to prove the fair market value of any property immediately before the levy.

Their continuing attack on the IRS procedures, i.e., the IRS' alleged failure to give notice and demand are without merit. Third parties are not entitled to notice of an assessment and demand for payment issued by the IRS to the taxpayer under 26 U.S.C. § 6330. Security Counselors, Inc. v. U.S., 860 F. 2d. at 870; cf. Jersey Shore State Bank v. U.S., 479 U.S. 442 (1987) (bank liable for employment taxes under 26 U.S.C. § 3505 not entitled to notice of assessment and demand for payment).

Similarly, an alter ego, nominee or successor of a taxpayer is not entitled to notices, a notice of assessment against a taxpayer or post-assessment notice of intent to levy that the IRS sends to the taxpayer. Valley Finance, Inc. v. U.S., supra, 629 F. 2d. 169-170. Additionally, while the IRS is required under 26 U.S.C. § 6335(a) to provide notice of seizure of personal property to the property's owner or "possessor thereof," the IRS is not required to give notice to a possible third-party claimant or search for them. Security Counselors, Inc. v. U.S., 860 F. 2d. at 870, citing Dieckmann v. U.S. 550 F. 2d. 622, 624 (10th Cir. 1977).

The Court finds that the claims of the plaintiffs/claimants with regard to the IRS procedures have no merit and are not relevant to the issues involved in a wrongful levy action pursuant to § 7426.

The Court found that Gagliardi failed to present competent credible evidence that he was the true owner of or had superior rights in the property seized and sold by the IRS. Moreover, Gagliardi failed to present such evidence with regard to the fair market value of the property immediately before the levy.

Additionally, the Court found that Gagliardi was the alter ego of USIF, World Enterprises and the Gagliardi Swap Shop. In retrospect, the Court finds that the evidence is clear that Gagliardi was also the alter ego to Van as well.

The IRS has the right to proceed against a nominee or alter ego of a taxpayer for the "purpose of satisfying the taxpayer's obligations." Ross Controls, Inc. v. U.S. Dept. of Treasury, I.R.S., 164 B.R. 721, 727 (E.D. Pa. 1994) (quoting Lemaster v. U.S., 891 F. 2d. 115, 119 (6th Cir. 1989) (citing Loving Savior Church v. U.S., 728 F. 2d. 1085 (8th Cir. 1984) (per curium)); Century Hotels v. U.S., 952 F. 2d. at 110-111; Valley Finance, Inc. v. U.S., 629 F. 2d. at 171-73; accord Avco Delta Corp. Canada Ltd. V. U.S., 540 F. 2d. 258, 264-65 (7th Cir. 1976); cert. denied., 429 U.S. 1040 (1977); Shades Ridge Holding Co., Inc. v. U.S., 888 F. 2d. 725, 728 (11th Cir. 1989)("[p]roperty of the nominee or alter ego of the taxpayer is subject to the collection of the taxpayer's tax liability") (citing G.M. Leasing Corp. v. U.S., 429 U.S. 338, 350-51 (1977)); cert. denied. 97 S. Ct. 619 (1977); see also Wolfe v. U.S. , 798 F. 2d. 1241, 1243-44, reh'g denied. 806 F. 2d. 1410 (9th Cir. 1986), cert. denied, 482 U.S. 927 (1987).

Pursuant to 26 U.S.C. § 6331, the IRS is authorized to levy on all property and rights to property of a taxpayer. The term levy includes seizure and distraint. G.M. Leasing Corp. v. U.S., 429 U.S. at 350. Therefore, the IRS is authorized to levy on property in possession of the taxpayer's alter ego, id, at 351, and the levy may also be served on the taxpayer's nominee. Towe Antique Ford Foundation v. I.R.S., Dept. of Treasury, U.S., 791 F. Supp. 1450, 1454 (D. Mont. 1992), aff'd 999 F. 2d. 1387 (9th Cir. 1993).

The criteria used to determine whether an entity or person is an alter ego of the taxpayer are similar pursuant to federal and state law. See Ross Controls, Inc. v. U.S., Dept. of Treasury, I.R.S., 164 B.R. at 727; Shades Ridge Holding Co., Inc. v. U.S. 888 F. 2d. at 728; Century Hotels v. U.S., 952 F. 2d. at 110 n. 4. The Pennsylvania law with regard to alter ego is summarized by the Court of Appeals for the Third Circuit in a non-IRS case, Ragan v. Tri-County Excavating, Inc. 62 F. 3d. 501, 508, (3rd Cir. 1995):

> [W]henever one in control of a corporation uses that control, or uses the corporate assets to further his or her own personal interests, the fiction of the separate corporate entity may be properly disregarded ....[N]o finding of fraud or illegality is required before the corporate veil may be pierced, but rather that the corporate entity may be disregarded "whenever it is necessary to avoid injustice." ...Pennsylvania alter ego law requires a showing that the subordinate company "acted robot-or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons."

It is clear that the court's scrutiny is directed to the issue of whether the corporation is so dominated and controlled by the individual that's its separate existence is a mere sham. In making such determination, the court should examine the totality of the circumstances. Century Hotels v. U.S., 952 F. 2d. 110; Valley Finance, Inc. v. U.S., 629 F. 2d. at 172; Avco Delta Corp., Canada Ltd. V. U.S.., 540 F. 2d. at 264-265. Moreover, individuals such as Gagliardi can be alter egos for their corporations. See U.S. v. Pisani, 646 F. 2d. 83, 88 (3rd Cir. 1981); accord Wolfe v. U.S., 798 F. 2d. 1241 (9th Cir. 1986); Harris v. U.S., 764 F. 2d. 1126, 1128 (5th Cir. 1985).

The court in performing an alter ego analysis should not only look to control, but should also examine the similarity between the taxpayer and the other business. Ross Controls, Inc. v. U.S., 164 B.R. at 727.

The evidence adduced at trial overwhelmingly supports the Court's finding that Gagliardi was and is the alter ego of not only USIF, World Enterprises and the Gagliardi Swap Shop, but also the alter ego of Van.[4] It is equally clear that because Gagliardi's testimony was so contradictory and incredible, the Court was not bound to give it credence with respect to the issues of ownership and value of the seized property. Cf. Anastasato v. C.I.R., 794 F. 2d. 884, 888 (3rd Cir. 1986) ("[Court] not bound to accept taxpayer's testimony at face value even when it is uncontradicted if it is improbable, unreasonable or questionable," quoting Baird v. Commissioner, 438 F. 2d. 490 (3rd Cir. 1970).)

Because the Plaintiffs/claimants failed to adduce competent and credible evidence in support of their claims, the Court properly dismissed the claims at the conclusion of their cases in chief. Cf. Magnuson v. Peak Technical Services, Inc., 40 F. 3d. 1244 (Table citation), 1994 WL 619727 (4th Cir. 1994) (unpublished opinion); Fechter v. Connecticut General Life Ins. Co., 800 F. Supp. 182, 196 (E.D. Pa. 1992) ("Rule 52(c) enables a court, acting as trier of fact, to dispose of an action when it is clear that plaintiffs have failed to prove their case....A plaintiff must satisfy its burden of proof by a preponderance of the evidence."); Textile Dyeing & Finishing Co., Inc., v. Commerce & Industry Ins. Co., 1992 WL 132508 (E.D. Pa. 1992); Robinson v. Sinclair & Valentine, L.P., 1993 WL 498326 (N.D. Ill. 1993); see also Martinez v. U.S. Sugar Corp., 880 F. Supp. 773, 775 (M.D. Fla. 1995), aff'd 77 F. 3d. 497 (11th Cir. 1996).

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[4] The record discloses, e.g., that Gagliardi had an ownership interes in the various entities, that he did not observe corporate formalities, it appears he commingled funds, and he issued unexplained checks to himself and family members from USIF's checking accoung. (Exhibit 28)

Conclusion

The evidence in this case clearly demonstrates that Gagliardi, the taxpayer, USIF, World Enterprises, Gagliardi's Swap Shop and Step-Van are all alter egos of one another and have no standing to maintain this action. Similarly, a review of the records discloses that the plaintiffs and the claimants all failed to present any competent and credible evidence that each owned property seized and sold by the IRS, and each failed to present competent and credible evidence of the fair market value of such property before the alleged levy.

For the foregoing reasons, an order will be entered denying the motions to alter or amend judgment.

Lee, J.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE TAX INDEBTEDNESS OF	)	
	)	MISC.NO.
U.S. Industrial Fabricators, Inc.	)	

APPLICATION OF REVENUE OFFICER
TO ENTER PREMISES TO EFFECT LEVY

The United States of America, on the basis of the attached affidavit, respectfully requests this Court to enter an order authorizing Revenue Officer Albert Balas and/or such other revenue officers as may be designated by the Internal Revenue Service to enter the premises located at 191 Wall Road, Clairton, PA 15025, and to enter any cash register, safe, vault or other locked safe keeping device located on or within said premises, for the purpose of seizing the property of U.S. Industrial Fabricators, Inc. as may be found therein, which is subject to levy by the United States in satisfaction of the outstanding Federal taxes now due and owing by said taxpayer, together with interest and costs as allowed by law.

_____
ASSISTANT UNITED STATES ATTORNEY

THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE TAX INDEBTEDNESS OF	)	
	)	MISC.NO.
U.S. Industrial Fabricators, Inc	)	

AFFIDAVIT

CITY OF PITTSBURGH	)	
	)	SS.:
Commonwealth of Pennsylvania	)	

Revenue Officer James E. Conteen, having been duly sworn, states as follows:

1. I am the Chief, Advisory Section, employed in the Collection Division of the Office of the District Director, Internal Revenue Service at Pittsburgh, Pennsylvania. As the Chief, Advisory Section, I am a revenue officer and familiar with with the duties of Revenue Officer Albert Balas. We as revenue officers have the duty and authority to collect Federal taxes by seizure and sale under the provisions of Section 6331 on the Internal Revenue Code of 1986. In my capacity as the Chief, Advisory Section, I have the duty to review and approve the request of Revenue Officer Albert Balas for authorization to enter private premises to effect levy and seizure of property. I have been advised of the following by Revenue Officer Albert Balas, whom I know and believe to be a reliable source for this information.

2.Assessments of tax, penalty and interest for withholding and Federal Insurance Contributions Act Taxes for the periods ending September 30, 1987, December 31, 1987, March 31, 1988, June 30, 1988, September 30, 1988, December 31, 1988, March 31, 1989, June 30, 1989, September 30, 1989, and December 31, 1989, have been made against U.S. Industrial Fabricators, Inc., 191 Wall Road, Clairton, PA 15025, EIN: 25-1195645 in the total amount of $32, 466.21 for which notice and demand was made pursuant to Sections 6201, 6203, and 6303 as indicated below:

ASSESSED AMOUNT	TYPE OF TAX	PERIOD ENDED	DATE ASSESSED	DATE
$4,841.54	941	9/30/87	12/04/89	12/04/89
5,807.15	941	12/31/87	12/04/89	12/04/89
3,869.72	941	03/31/88	07/18/88	07/18/88
168.20	941	06/30/88	09/05/88	09/05/88
301.10	941	09/30/88	12/26/88	12/26/88
238.20	941	12/31/88	03/26/89	03/26/89
6,494.31	941	03/31/89	03/19/90	03/19/90
5,708.68	941	06/30/89	2/25/89	2/25/89
2,751.33	941	09/30/89	2/25/89	2/25/89
2,285.98	941	12/31/80	03/12/90	03/12/90

Note: Reference to 941 type of tax means Withholding and Federal Insurance Contribution Act taxes reported on Form 941.

3. The said taxpayer has neglected or refused to pay the full amount of the tax assessed within 10 days after such notices and demands and this neglect or refusal continues.

4. There is now due, owing, and unpaid with respect to such taxes penalties, interest, and lien fees a total amount of $38,599.42, plus statutory additions as provided by law. Final notice of intent to levy required by Section 6331(d) of the Internal Revenue Code was mailed on July 18, 1988 for 941/ March 31, 1988, September 5, 1988 for 941/ June 30, 1988, December 26, 1988 for 941/September 30, 1988, March 26, 1989 for 941/ December 31, 1988, December 4, 1989 for 941/ September 30, 1987 and December 31, 1987, December 25, 1989 for 941/ June 30, 1989 and September 30, 1989, March 12, 1990 for 941/ December 31, 1989, and March 19, 1990 for 941/ March 31, 1989.

5. By reason of the assessment, liens have arisen on all property and rights to property of said taxpayer as prescribed by Sections 6321 and 6322 of the Internal Revenue Code of 1986 (26 U.S.C.).

6. By reason of the taxpayer's neglect and failure to pay such taxes within 30 days after notices and demands, a levy may be made on all property and rights to property belonging to the taxpayer or to which the Federal tax lien attaches.

7. U.S. Industrial Fabricators, Inc. is a corporation engaged in the operation of a salvage business. The business is conducted from premises rented by the taxpayer and located 191 Wall Road, Clairton, PA

15025. The assets to be levied consist of equipment, inventory, furnishings, cash register and contents thereof. The revenue officer inspected the premises and requested, but was refused by John Gagliardi, President, permission to enter for the purpose of levy on September 5, 1990.

_____/s/ _____
Room 922 (James E. Conteen)
1000 Liberty Avenue
Pittsburgh, PA 15222

Subscribed and sworn to before me this 12th day of October, 1990.

_____/s/ _____
Janet R. Pickering, Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE
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IN THE MATTER OF THE TAX INDEBTEDNESS OF	)	
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ORDER FOR ENTRY ON PREMISES
TO EFFECT LEVY

The United States having filed an application requesting authorization for Revenue Officer Albert Balas and/or other designated revenue officers to enter the premises located at 191 Wall Road, Clairton, PA 15015 and to enter any cash register, safe, vault or other locked safe keeping device located on or within said premises, in order to seize property in satisfaction of unpaid Federal taxes, together with the affidavit of James E. Conteen in support of that application, and the court finding, on the basis of the affidavit, that there is probable cause to believe that property or rights to property belonging to U.S. Industrial Fabricators, Inc., or to which the Federal tax lien attaches, which are subject to levy by the United States pursuant to Section 6331 of the Internal Revenue Code are located on or within the premises described, it is

ORDERED that Revenue Officer Albert Balas and/or other designated revenue officers are authorized to enter the premises described and to enter any cash register, safe, vault or other locked safe keeping device located on or within said premises and to make such search as is necessary in order to levy and seize, pursuant to Section 6331 of the Internal Revenue Code of 1986. In making this search and seizure, however, such revenue officers are directed to enter the premises during business hours or the daytime and within 10 business days from the date of this order.

DATED: November 9, 1990

/s/
Donald J. Lee
United States District Judge

IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT
96-3671

JOHN GAGLIARDI; IRWIN A. SCHIFF;DAVID LIKENHEIMER, JULIUS JONES;STEP VAN SERVICE CO., INC.; JOSEPH MARK;NEIL PRICE, ESQ.,
v.
UNITED STATES OF AMERICAJOHN GAGLIARDI, LEE GAGLIARDI*Appellants

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PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC (F.R.A.P. Rule 35,40)

TO: The Honorable Judges of the United States Court
Of Appeals For the Third Circuit

John Gagliardi and Lee Gagliardi , the Plaintiffs/Appellants in the above named case present this, their Petition for Rehearing En Banc and in suport thereof respectfully show:

(1) Two reasons for rehearing of case are: a) correction of legal error; and b) establishment of legal rules for future guidance....only the latter is ordinarily worthy of the attention of the full Court (En Banc). Church of Scientology of California v. Internal Revenue Service, 792 F. 2d. at 155, 253 U.S. App. D.C. 85 cert. granted 107 S. Ct. 947, 479 U.S. 1063, affirmed 108 S. Ct. 271.

(2) En Banc consideration is appropriate under extremely unusual cases to cure a gross injustice, U.S. v. Lynch, 690 F.2d. 213 (U.S. App. D.C.).

(3) The panel frankly abdicated its responsibility to conduct adequate appellate judicial review by its entry of a sterile judgment order after denying to the appellants oral argument in the instant case despite the presence of several sharply contested issues.

(4) The panel ignored clearly erroneous Internal Revenue Service misconduct that was "shocking to the conscience," i.e. the IRS' failure to conduct a comprehensive inventory of the property it seized with the result of auctioning it off at commercially unreasonable prices far below fair value. Ringer v. Basile, 645 F. Supp. 1517 (D. Colo. 1986).

(5) The panel ignored a clearly erroneous order "order for entry to effect levy" signed by trial Judge Donald J. Lee amounting to issuance of a general warrant, and non-conforming to the Federal Rules of Criminal Procedure.

An IRS application for entry warrant to seize specifically identified items to sell in satisfaction of tax liability and conduct of search are subject to standards established for criminal search warrants. Matter of Stubblefield, Inc. E.D. Cal. 1992, 810 F. Supp. 277).

(6) Trial Judge Donald J. Lee was obviously in error when he therefore ruled that the above referenced Criminal Rule was not applicable to the Plaintiffs/Appellants case insofar as it was a civil and not criminal matter.

(7) In this case, the IRS did not file an adequate inventory - one that would allow them to identify the property seized as required. In United States v. Eastman, 456 F. 2d. 1057, 1062 (3rd Cir. 1972), the Third Circuit, following the language of Berger v. New York, 388 U.S. 41,60 (1967), said "The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed, but rather it is one in which specific provisions of Title III were deliberately and advertently not followed. In other words, the failure to file the notice of inventory is no ministerial act."

(8) The trial judge declared Gagliardi's testimony to lack credibility but proffered no specific reasons for disputing his testimony, which was largely expert in nature and which was often beyond the ability of a layman, including Judge Lee, to comprehend.

(9) The Panel ignored the IRS' participation in the sale of negotiable U.S. currency for less than its face value and the sale of the U.S. Savings bonds registered in the names of uninvolved third parties.

(10) While the trial judge held the plaintiffs/appellants to a high standard of establishing proof of ownership and value of property seized and sold, the Panel failed to recognize that this burden was compromised by the IRS' intentional spoliation of the evidence insofar as the IRS could neither identify nor value said items beyond a cursory formula and further, allowed the destruction and/or loss of records on hand that would have facilitated the ability of the plaintiffs/appellants to meet their court mandated burden.

(11) The Panel implicitly endorsed the trial judge's adoption of an ex post facto determination of alter ego averments by the IRS when in fact alter ego arguments must be made prior to asset sale which clearly was not done in this case. Pattorf v. CIR., D.C. Kan., 95-1 USTC 50, 205 (1995).

WHEREFORE, the Plaintiffs/Appellants respectfully move the Honorable Judges of the Third Circuit for a Rehearing En Banc and a reversal of the Judgment Order affirming the unpublished opinion of United States District Court Judge Donald J. Lee.

/s/
John Gagliardi, Pro Se
141 Wall Road
Clairton, PA 15025
(412) 233-2506

/s/
Lee Gagliardi, Pro Se
210 Grouse Dr.
Elizabeth, PA 15037
(412) 384-9250

DATE: September 30, 1997